IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-625

DENNIS JOHN LEWIS
a/k/a Richard Kennedy,

Petitioner,

v.

GREYHOUND LINES-EAST, *et al.*,

Respondents.

BRIEF OF RESPONDENT GREYHOUND LINES-EAST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This case presents no issue warranting further review. Contrary to the claims made in the petition, no rule has been created which conflicts with or in any way expands or diminishes decisions of this Court. The decision of the United States District Court for the District of Columbia turned upon the District Judge's application of the principles announced in the line of cases culminating with *Vaca v. Sipes*, 386 U.S. 171 (1967) and amplified in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) to the indisputed facts of record.

No new standard for proving a breach of the duty of fair representation was established by *Hines*. This Court reiterated therein the test of earlier cases that "... the burden on em-

ployees will remain a substantial one" to show that his "representation has been dishonest, in bad faith or discriminatory." In the absence of such a showing this Court goes on to point out that "[t]he finality provision [of an agreement to arbitrate disputes] has sufficient force to surmount occasional instances of mistake."

The District Court reviewed the uncontroverted facts and found that the plaintiff's [Petitioner's] burden of showing a threshold level of ill-motive or arbitrary action on the part of th Union had not been met.[1]

In affirming *per curiam* this order the Circuit Court of Appeals noted that it similarly found no evidence to support a conclusion that the Union had breached its representation duty. There is no novel issue or pronouncement of legal principle in the opinion which merits review by this Court.

Petitioner nevertheless contends that the case creates a rule allowing unions to modify collective bargaining agreements without informing its members. The record reflects no modification of the collective bargaining agreement. There was merely a set of uniform interpretations and procedures for use by all local unions operating under the same contract. The record further reflects that Petitioner Lewis (who was known during the relevant time period as Richard Kennedy) was informed of the provisions of the "National Interpretations Manual".

Petitioner has made much of his allegation that the neutral arbitrator, who is charged with responsibility (under Section 1, Article 3 (j) of the collective bargaining agreement)[2] for pre-

[1]Pet. App. 15(a). All references to Petitioners Appendix are designated "Pet. App."

[2]Res. App. A *infra at* 6a, Defendants' Exhibit "A" attached to motion for summary judgment in the district court. All references to the record contained in the Appendix filed by Respondent Greyhound are denoted "Res. App.".

paring a decision in the case, found that the grievant (Petitioner) had abandoned his job. The opinion does not rely entirely upon that finding but goes on to recite a whole series of events which in the arbitrator's view justified the employer's discharge action. Included in the findings of the arbitrator was the finding that the grievant had the assistance of a union representative "during all substantive discussion" with the employer and that such discussions were unproductive because of the grievant's failure to cooperate.[3]

Seeking to overturn the arbitration award on grounds separate from the alleged breach of representation duty, Petitioner argues to this Court that reference to a National Interpretations Manual which contained "agreed-upon practices and procedures"[4] of the Company and Union constitutes a fundamental breach of the principle that the arbitrator's award must draw its essence from the collective bargaining agreement.

The *Steelworkers* trilogy[5] made it quite clear that the arbitrator is not bound to draw the meaning of an agreement exclusively from its four corners. See *Dunau, Three Problems in Labor Arbitration*, 44 Va. L. Rev. 427 at 458 (1969).[6] As this

[3]Res. App. B. *infra at* 6b, Defendants' Exhibit "B" attached to motion for summary judgment.

[4]Res. App. B *infra at* 3b.

[5]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 St.Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

[6]The Union presented Lewis' grievance through Bernard Dunau, Esq., an able and respected attorney who was well acquainted with the issue of union representation at pre-disciplinary hearings by reason of having been counsel at that very time in the case of *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

Court stated in *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-582, 80 S.Ct. 1347 (1960):

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it."

Accord, *Gateway Coal Co. v. UMW*, 414 U.S. 368 at 379 (1974). In *United Steelworkers v. Enterprise & Wheel Car Corp.*, 363 U.S. 593, 597-598 80 S.Ct. 1358 (1960), this Court went on to further explicate the principle:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring *his informed judgment* to bear in order to reach a fair solution of a problem . . . He may of course look for guidance from many sources. . . ."

* * *

> ". . . A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. [Emphasis added]

Thus, the opinion of the Circuit Court of Appeals merely applies the teachings of this Court to a factual situation where the arbitration opinion makes passing mention of an agreed-upon interpretation of the collective bargaining agreement which the Union and the Company had adopted and which the Union had a right to adopt under *Ford Motor Co. v. Huffman*,

345 U.S. 330, 338 (1953) and *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).

In addition, Petitioner raises before this Court for the first time[7] the question of signatures of members of the Board of Arbitration or majority concurrence in the award, which states that it is the "sole responsibility of" Mr. Knowlton, the neutral member of the Board of Arbitration.

The collective bargaining agreement at Section 1, Article 3(e)[8] provides that if representatives of the two parties are unable to resolve a dispute referred to them, they shall select a third neutral arbitrator from a permanent panel and the Board of Arbitration shall convene to hear the case. Article 3(j) states:

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[7]Petitioner never once mentioned the issue of signatures on the arbitration opinion and award in his complaint or any of the memoranda or briefs filed at any time prior to his Petition for Rehearing before the Court of Appeals. Presumably this new theory arose purely as a result of the dissenting opinion by Circuit Judge MacKinnon. The dissenting opinion of Judge MacKinnon in the Circuit Court of Appeals is relied upon heavily by Petitioner. The opinion is fatally flawed in two respects, however. First it undertakes to do precisely what this Court has prohibited in each of the *Steelworkers'* cases, *supra*, and with particular emphasis in *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 599, where it is stated that ". . . courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his".

Judge McKinnon would usurp the function of the arbitration tribunal by reviewing the case on the merits and substituting his view of the facts for that of the trier of facts. Moreover, he ignores the totality of the opinion, singling out for exception certain elements as to which he differs because of a highly legalistic approach. The *Steelworkers* trilogy teaches that arbitration is a method for resolving disputes which by its very nature will result in less legalistic approach than would result if courts were substituted for the less formalistic procedure.

[8]Res. App. B *infra at* 4a.

> "In discharge cases, the third arbitrator shall be instructed to issue his decision as promptly as possible after receipt of briefs from the parties. Briefs shall be submitted within fifteen (15) days after receipt of the transcript. In order to expedite the written decision of the third arbitrator, same may be issued prior to the written opinion explaining the decision. Executive sessions shall be discouraged, except where requested by either party to clarify language in the decision or award. If executive session is not requested within ten (10) days after receipt of the opinion, the right to an executive session is waived."

Thus, the contract contemplates that a written opinion shall come from the neutral third party. It is then to be circulated for notation of concurrence or dissent by the representatives of the adverse parties who can, if they wish, call for "executive session". It is quite understandable, since opinions are published, that a professional neutral labor arbitrator would note that the *opinion* explaining the award was authored only by him.

Petitioner further seeks review on the grounds of a serious procedural flaw – that the award was not signed by a majority of the members of the Board of Arbitration. This issue is raised by Petitioner for the first time before this Court, presumably for the sole reason that it was a subject of discussion in the dissenting opinion in the Circuit Court of Appeals. The issue is, however, completely without substance since the award was in fact signed by all members of the Board of Arbitration.

Petitioner notes in his Petition to this Court [Petition p.6 n.2; p.9 n.3] that when the issue was raised by him on a Motion for Reconsideration in the Court of Appeals counsel for Respondent herein (Appellee below) corresponded with the Clerk of the court pointing out that a copy of the award which had

been sent to the parties by Arbitrator Knowlton, but which had not been circulated for signature, had been used as an exhibit through clerical error. It was further pointed out that copies which had been signed at the time of the rendering of the award were available for clarification of the record.

Petitioner's questioning of the existence of the signed document in his petition for writ of *certiorari* suggests that he has never bothered to examine a true copy of the document over which he has vigorously litigated and requested intervention by the highest court of the land.

It goes without saying that review by this Court is inappropriate where Petitioner has wittingly remained uninformed about the essential elements of his dispute with Respondents.

This case presents, as the arbitration opinion recites, a simple situation of an employee who was unwilling to listen to or heed the advice of either his employer or his union and now seeks judicial redress for problems of his own making.

By reason of the clarity and forcefulness of this Court's many opinions in this area and of the very limited nature of the Court of Appeals' indisputably correct decision, review is unwarranted. There is no pressing need for the Court to announce once again either (1) that arbitrators, not courts, are to decide disputes subject to arbitration under collective bargaining agreements; or (2) that a Union can be held to have breached its duty of fair representation only when it is shown

to have acted dishonestly, arbitrarily, discriminatorily or in bad faith.

Respectfully submitted,

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APPENDIX

AGREEMENT

between

Greyhound Lines, Inc.

and the

National Council of Greyhound Divisions

Comprised of Divisions
1042—1043—1063—1098
1126—1150—1174—1201
1202—1203—1205—1210
1211—1238—1303—1313
1314—1315—1323—1326
1493—1500—1516

Amalgamated Transit Union
AFL-CIO CLC

Effective November 1, 1971

Expires October 31, 1974

MEMORANDUM OF AGREEMENT

THIS AGREEMENT, effective November 1, 1971, entered into by and between GREYHOUND LINES, INC., and its successors, lessees and assignees hereafter called the "Company", party of the first part, for and on behalf of its GREYHOUND LINES – WEST (CENTRAL STATES) and GREYHOUND LINES – EAST (NORTHERN AND SOUTHERN STATES) Divisions and the NATIONAL COUNCIL OF GREYHOUND DIVISIONS, comprised of Local Union Divisions 1042, 1043, 1063, 1098, 1126, 1150, 1174, 1201, 1202, 1203, 1205, 1210, 1211, 1238, 1303, 1313, 1314, 1315, 1323, 1326, 1493, 1500 and 1516 AMALGAMATED TRANSIT UNION, AFL-CIO, hereinafter called the "Union" or "Council," party of the second part.

N–Means National Common Language–Applies to all Divisions

Central States Appendix–Applies to Divisions 1126-1150-1313

Northern States Appendix–Applies to Divisions 1042-1043-1063-1098-1201-1202-1203-1205-1210-1211-1303-1516

Southern States Appendix–Applies to Divisions 1174-1238-1314-1315-1323-1326-1493-1500

This will confirm our understanding of today that the titles used either in the contract or in any proposals or agreements reached in this negotiation are for reference purposes only and such titles are not to be considered as a part of the language of the section.

This will also confirm that cross references shown below the word, "Reference," on proposals or agreements reached

in this negotiation are likewise for reference purposes only. It is further understood the economic features of this agreement are subject to approval or modification by The Federal Pay Board.

SECTION 1 – GENERAL CLAUSES – NATIONAL

N.ARTICLE 1. RECOGNITION–The Company recognizes the Union as the duly designated and sole collective bargaining representative for all employees in the occupations as set forth in the wage provisions hereof or any substantially similar occupations if the same are created in the groups and departments hereinafter referred to, except for supervisory employees with the power to hire or fire or with the right effectively to recommend hiring or firing, and agrees to meet and treat with the duly accredited officers and committees of the Union on all questions relating to hours, wages and working conditions, and agrees to deal with it as hereinafter provided.

N.ARTICLE 2. UNION SECURITY–All employees within the terms of this Agreement must become and remain members of the Union not later than the thirty-first (31st) day following their date of employment as a condition precedent to their continued employment with the Company.

N.ARTICLE 3. GRIEVANCE PROCEDURE–(a) All differences, disputes, suspensions, discipline cases and discharge cases, hereinafter collectively referred to as "Grievances" between the parties arising out of or by virtue of the within collective labor agreement, shall be disposed of as hereinafter provided in this Article. The procedure for handling employee or Union grievances shall be as follows,

(b) An employee and/or Union grievance shall be presented in writing by the employee and/or the Union representative to the supervisor designated by the Company within twenty (20)

calendar days from date of occurrence of the incident upon which the grievance is based, or within twenty (20) days from the date claim denial is received.

(c) Failing satisfactory disposition of such grievance on this level by written decision within ten (10) days from receipt of said grievance, the matter may be presented in writing within the next twenty (20) days to the Regional Manager or his representative. Within ten (10) days of receipt of said appeal, the Regional Manager will give his written decision to the appeal. The place for the Regional Manager's Hearing shall be the Home Terminal of the Employee involved unless otherwise agreed between the parties.

(d) Failing satisfactory disposition of such grievance by the Regional Manager or his representative, the Union may present the matter in writing within thirty (30) days after receipt of his decision to the President of the Company, or his representative.

(e) ARBITRATION—If such decision is not satisfactorily adjusted by written decision within ten (10) days from the date of the submission (date of receipt to govern) to the President of the Company, or his representative, the Union may within forty-five (45) calendar days, after the President's or his representative's decision, submit the issue in writing for final determination to a Board of Arbitration consisting of three persons, one arbitrator to be chosen by the Company and one by the Union. The two arbitrators shall be chosen within ten (10) days after arbitration is decided upon and they shall endeavor to reach an agreement within ten (10) days from the date the second arbitrator was appointed. Failing to reach an agreement within said ten (10) days a third arbitrator shall be chosen by the two within ten (10) days from the date of the first meeting between the two arbitrators. The third arbitrator shall be chosen from the seventeen-man permanent panel agreed to by the parties by alternately striking names until one remains and

he shall be immediately notified.

The question as to which party will strike first shall be determined by the toss of a coin. In making such submission the issue to be arbitrated shall be clearly set forth in writing. The Board so constituted will convene immediately and weigh all evidence and arguments on the point in dispute and the written decision of a majority of the members of the Board of Arbitration shall be final and binding upon the parties. The Board of Aribtration shall have no power to delete from, add to, nor modify the terms of this Agreement. The parties shall jointly share the cost of the third arbitrator and the cost of a transcript should either party desire same.

(f) In discharge cases, at the request of either party, the availability of the third arbitrator shall be determined by telephone. If an arbitrator does not have ample time available within sixty (60) days, the panel member whose name was last struck shall at the election of either party be selected as third arbitrator. The same procedure shall be followed in determining his availability, and so on, until a panel member is found who has one or two days available within sixty (60) days.

(g) Conference will be held at all levels of the grievance procedure if requested by either the Company or the Union, and in such cases the time limits applicable to the written appeal and decisions shall also be in effect. Such hearing will be held within the time limits as spelled out in (c) of this article.

(h) All arbitration decisions will be published.

(i) PERMANENT PANEL—In the event a member or members of the seventeen-man permanent panel resigns or dies, a successor or successors shall be chosen by the parties hereto in accordance with the method used in choosing the original panel. If either of the arbitrators appointed by the parties should die,

resign, or be unable or unwilling to serve, the party he represents shall appoint his successor within three (3) days after receiving such notice, without affecting the proceedings.

(j) In discharge cases, the third arbitrator shall be instructed to issue his decision as promptly as possible after receipt of briefs from the parties. Briefs shall be submitted within fifteen (15) days after receipt of the transcript. In order to expedite the written decision of the third arbitrator, same may be issued prior to the written opinion explaining the decision. Executive sessions shall be discouraged, except where requested by either party to clarify language in the decision or award. If executive session is not requested within ten (10) days after receipt of the opinion, the right to an executive session is waived.

(k) DISCIPLINE—An employee will not be disciplined or discharged, nor will entries be made against his record without sufficient cause, and in each case where disciplinary action is taken he will be given a complete written statement of the precise charges against him and the disciplinary action to be taken. Such written statement will be furnished to the employee in person, or by certified or registered mail, return receipt requested prior to the commencement of such discipline. Notification thereof shall be furnished to the local division of the Union simultaneously therewith.

(l) Disciplinary action charged on the personnel record of an employee shall be removed after a period of four (4) years from date in the event that no similar disciplinary action has been charged to such record.

(m) The Company will permit an employee or his representative, upon request, to either copy or check the service record and medical examination reports. Upon request, the Company will furnish the Union copies of said service record and medical examination reports, where Company has a copying machine

readily available and such records are not voluminous.

(APPLICABLE TO NORTHERN STATES ONLY)

(n) Letters of complaint, phone calls and complaints made in person shall not form the basis for disciplinary action involving a day or days off unless the complaint appears in person at the hearing on the Regional Manager's level.

(APPLICABLE TO SOUTHERN AND CENTRAL STATES ONLY)

(n) Where a person has made a complaint against an employee that involves discipline in excess of ten (10) days or discharge, the complainant will be produced at the Regional Manager's hearing when requested by the Union; in cases of suspension of 10 days or less, the Complainant's deposition will be taken if requested by the Union.

(o) SENIORITY: AFFECT—No discipline by suspension shall be administered any employee which shall permanently impair his seniority.

(p) When discipline is rendered or discharges are ordered, same will be done by the Superintendent (Operating or Maintenance), Regional Manager, Terminal Manager, or their assistants, however, the employees immediate supervisor may remove the employee from service, as set forth in following paragraph of the Article and may recommend to the Superintendent, Regional Manager, Terminal Manager, or their assistants, the discipline to be imposed in such cases of which he has knowledge.

(q) The Company will not suspend or remove from service any employee until the completion of an investigation and the discipline is specifically prescribed. However, any employee

may be dismissed or suspended immediately for insubordination, intoxication or dishonesty. In cases of serious accidents, no disciplinary action will be taken until the completion of the investigation; however, an operator may be withheld from active service on a standby basis until the investigation is completed. Such operators will be compensated for the time they are held on a standby basis; regular operators, their regular run pay – extra operators, earnings missed. If investigation results in an employee being dismissed or suspended for more than ten (10) days, such case may be taken directly by a representative of the Union to either the Regional Manager, or his representative, or the President of the Company or his representative, in accordance with the applicable time limits prescribed for this level of the grievance procedure.

(r) Except as provided in the next paragraph, discipline rendered shall be taken within twenty (20) calendar days after the Company's knowledge of the incident. Upon request, an additional ten (10) calendar days will be granted. Company as here used means any Greyhound bus company or company supervisor or checker.

(s) As to discipline rendered to employees on the basis of checker's reports involving improper handling of Company funds or property for which the Company is responsible, no checker's report shall form the basis for disciplinary action unless the same is made the basis of a charge within four (4) months of date of such checker's report; and the most recent checker's report shall be made within thirty (30) calendar days preceding the date of such disciplinary action.

(t) Inspectors in checking employees are to give the facts pertaining to the performance of their duties. Personal opinion of inspectors not substantiated by such facts will not be made the basis of rendering discipline.

(u) If, as a result of the appeal to the Regional Manager, or President, the discipline or the discharge is revised, or cleared, the record of the employee will be corrected accordingly and the employee will be paid for any loss of earnings in accordance with the decision rendered, plus reasonable expenses if the same were incurred as a result of such investigation or hearing having taken place at a point other than the home terminal of the employee involved.

(v) If the dispute involves discipline or discharge, the place for arbitration shall be the home terminal of the employee involved unless otherwise agreed between the parties. The place of all other arbitrations shall be agreed upon.

(w) When any issue shall arise under the provisions of this Agreement that affects the interests of the employee of more than one of the Divisions of the Union, such issue shall be arbitrated only by action and authority of the Council.

(x) COMPANY AGGRIEVED—In the event any grievance, dispute or difference originates in which the Company regards itself as the aggrieved party, the Company shall take up such matter within thirty (30) calendar days from the occurrence on which such grievance is based with the Local President in the Division in which such grievance originates. Failing satisfactory disposition of such grievance within ten (10) days from the date of such submission, the matter may be taken up by the duly designated Company representative within the next ten (10) days, with the Council of the Union. In the event no satisfactory adjustment is reached within ten (10) days after such submission, the issue may be submitted for determination to arbitration in the manner hereinabove provided for not later than thirty (30) calendar days thereafter.

(y) In each instance where time limits are set forth in the grievance and arbitration procedure and the days referred to are

not referred to as calendar days, it is understood that said time limits are exclusive of Saturday, Sunday and holidays.

1. In each instance where time limits are provided in the grievance and arbitration procedures, an additional ten (10) days will be granted if requested in writing. An extension in excess of ten (10) days will require mutual agreement.

Except issues involving contract interpretations will not be extended more than thirty (30) days without the approval of the National Interpretations Committee.

[Remaining Portions Deleted]

APPENDIX B

In the Matter of the Arbitration

between

GREYHOUND LINES – EAST — **OPINION**

– and – — **AND**

TRANSPORTATION LOCAL DIVISION 1098 — **AWARD**

Re: Discharge of Richard Kennedy

At the hearing held on June 12, 1974 and February 11, 1975 in Washington D.C. both of the above-named parties were represented. A dispute with respect to the discharge of Richard Kennedy was presented to a Board of Arbitration consisting of Fred Bowman, John Ferguson and Thomas A. Knowlton for decision.

The parties originally had intended to submit briefs subsequent to the hearings. They later agreed to limit their post-hearing statements to the entry of a Supreme Court decision which was considered by the Union to be relevant and to comment thereon.

The following opinion is the sole responsibility of the undersigned, Knowlton.

DISCUSSION

Mr. Kennedy was hired in April 1965 in the Washington, D. C. terminal. On August 3, 1973 he was employed there as a Telephone Information Clerk. He was assigned to work on the 11:30 p.m. to 8:00 a.m. shift.

At or about 7:50 a.m., *i.e.*, about ten minutes before he was scheduled off, Mr. Kennedy was the cause of some rather minor problems involving his actions at the time which in the judgment of supervisory officials, required their intervention. In general terms, it is correct to say that he was not working and that he was, at least to some extent, interfering with the work of his colleagues in the telephone answering service. It is also fair to say that, in general, everything that transpired thereafter, which finally resulted in his termination on August 8, was caused primarily by his refusal to accede to normal established practice in the terminal and his insistence upon the mistaken belief that his Employer was mistreating him and that his Union was insufficiently diligent in his behalf.

Mr. Kennedy was working at the time on a job in a newspaper office in Washington at which his hours of work were 9:00 a.m. to 5:00 p.m., Monday through Friday. A few minutes before eight o'clock, he was asked by the then Terminal Manager, Grady Brown, to accompany him to Mr. Brown's office together with another Supervisor, Mr. McGuffy. It was Mr. Brown's intention to discuss Kennedy's actions with him and seek to straighten out the matter. It is quite possible that such a meeting would have resulted in some minor disciplinary action being taken by the Employer to persuade Mr. Kennedy of the error of his ways.

Mr. Kennedy took two positions regarding this matter: first, that he would only proceed to Mr. Brown's office if he were provided with Union representation and, second, that he

insisted upon his right to leave the premises at 8:00 a.m. There was then available in the terminal at least one Union Steward, Mr. Gray. Mr. Brown was aware of an agreed-upon understanding between the parties at the time that Union representation in such an exploratory meeting was not required and he made this known to Mr. Kennedy. The meeting did not take place because Mr. Kennedy punched out at 8:01 a.m. and departed.

Sometime later that morning, while Kennedy was employed at the newspaper, he received a phone call from Mr. Brown in which, among other things, Brown told him that:

> "unless. . .he [reported] to my office at once without a Union representative. . .[he] would not be allowed to return to work."

It seems obvious to me that the words "at once" or "Immediately", as used by Mr. Brown in his phone call, were not necessarily intended to mean that Kennedy had to leave his day-time employment and return to the terminal. At least, since it was apparently coupled with a statement that Mr. Kennedy would not be permitted to work until he had first met with Mr. Brown and that it would be necessary to make an appointment ahead of time to do so, it cannot be concluded that it was then the intention of the Employer to do more than reassert its position that a meeting must take place at a mutually convenient time and in accordance with accepted practice.

From that point on, certainly, Mr. Kennedy's difficulties were completely the result of his own failure to accept these agreed-upon practices and procedures. He testified that over the weekend of August 4-5 on which he had been scheduled to work, as also on August 6, he attempted to communicate with the Union's President, Mr. Butler, but was unable to do so since Mr. Butler was not in the office. He was of course aware that there were other Union Representatives available to him and he

made no attempt to communicate with them for the purpose of arranging an early meeting. He also made no attempt, after the morning conversation with Mr. Brown on the 3rd, to communicate with the Employer.

On August 6th, he finally reached Mr. Butler on the phone. On Tuesday, the 7th, he met with Mr. Butler in the morning at the terminal and an attempt was then made to meet Mr. Brown. Mr. Brown was busy and was unable to see Mr. Kennedy at that time, but an arrangement was made for a meeting to take place on the following day, August 8th.

There were present at part or all of that meeting, Messrs. Brown, McGuffy, the Supervisor of City Sales, Kennedy and Butler. Kennedy reacted quite negatively to Mr. Brown's efforts to discuss with him those of his activities on the morning of August 3rd which were considered by Brown to be inappropriate. He accused Mr. Brown of basing his criticism on a "pack of lies. . ." and indicated that he did not believe that any explanation was due from him. Mr. Brown showed him a "Form 5 (a Disciplinary Report)" which summarized Mr. McGuffy's description of the events of the morning of August 3rd prior to Mr. Kennedy's departure, at which point Kennedy said that he was then also prepared to regard Mr. McGuffy as a liar.

There is some confusion as to whether, as Kennedy insists, he was, at the time of the meeting of August 8, already aware that the Employer had decided to terminate him through the issuance of a "Form 6" but there is no doubt that he and Butler were given Form 6 by Mr. Brown at the August 8th meeting. The document in question, the original of which was signed by Mr. Brown, bears the date of August 7th, *i.e.*, the day before the meeting. Mr. Kennedy testified that he had been shown this Form by Mr. Butler when he first met with him on August 8th and before the meeting with Mr. Brown. Mr. Butler denied having seen that document much less having had possession of it,

until after it was given to him and Kennedy at the meeting.

At the beginning of the Brown-Kennedy discussion at which Mr. McGuffy was present, Mr. Butler remained just outside the office door. A few minutes later, Mr. Butler was called in by Mr. Brown and there was a relatively short discussion during which Mr. Butler attempted to resolve the problem and Mr. Kennedy objected strenuously to what he considered to be a lack of vigor on Mr. Butler's part to uphold his position. There then followed a brief meeting between Butler and Kennedy outside the office. Mr. Butler attempted to calm Mr. Kennedy, remonstrating with him as to his attitude and telling him that if he, Kennedy, indicated a willingness to be more reasonable in his attitude and statements, the matter could be adjusted. At that point, Kennedy insisted upon an apology from Brown and McGuffy. The two men returned to Brown's office with no change in Kennedy's position. The Form 6 was handed to Kennedy and the meeting ended.

A grievance was written, protesting the discharge, as follows:

> "The action taken on Wed., Aug. 8 was unjust. The statements on my Form 6 issued today are untrue. Therefore I am appealing Mr. Brown's dismissal of me and do hereby request payment for all time lost as a result of his actions this day."

It is on the basis of this grievance, after the parties' further attempts to resolve the issue, that arbitration was required.

I find that there is nothing in the factual recitation which is set forth in Form 6 which can properly be termed either "a lie" or "incorrect." I find that a statement in Form 6, that Mr. Kennedy abandoned his job because of his failure to communicate with Mr. Brown from August 3rd through August 7th, is

correct but somewhat incomplete for the reason that Mr. Kennedy did make efforts to support his position to the extent, at least, that he attempted to communicate with Mr. Butler.

With respect to the Union's claim that Mr. Kennedy was improperly denied the representation of a Union official at a meeting between Messrs. Brown and Kennedy prior to Mr. Kennedy's termination it submitted to me a decision of the United States Supreme Court *(NLRB v. J. Weingarten, Inc.)* on February 19, 1975.

In connection with this claim of the Union I find as a fact that at the only meeting which Mr. Kennedy had with Mr. Brown prior to his discharge, Mr. Butler was present during all of the substantive discussion which, because of Mr. Kennedy's attitude, was incomplete and ineffective.

I find further that the issue here relates to the failure of Mr. Kennedy to recognize the right of the Employer to reasonably control the activities of its employees, in this case Mr. Kennedy, on the Employer's property during hours for which the employees are paid.

The grievance procedure, which in broad terms constitutes an effort to resolve disputes at as early a stage as is possible, was in this case utilized in its initial steps at the August 8th meeting.

The failure of that procedure to operate effectively was in no way due to any lack of representation by the Union at the investigative session. It failed only because Mr. Kennedy refused to recognize and accept his obligations as an employee to so comport himself as to further the purposes for which he was paid and, equally important, to heed the advice of his Union representative whose intercession he had requested, when the latter attempted to handle the dispute intelligently and correctly.

I believe on the basis of all the testimony and evidence which were adduced at the hearings, that Mr. Kennedy's grievance should be denied.

AWARD

The undersigned Board of Arbitration hereby makes the following Award:

The discharge of Richard Kennedy was proper under the terms of the parties' Collective Bargaining Agreement.

/S/ Thomas A. Knowlton
Thomas A. Knowlton

April 28, 1975

Fred Bowman
Concurring/Dissenting

John Ferguson
Concurring/Dissenting